Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-583

STATE OF MINNESOTA,

Petitioner,

v.

WILLIAM HELENBOLT,

Respondent.

PETITIONER'S REPLY ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

ALAN L. MITCHELL
St. Louis County Attorney
By: MICHAEL W. McNABB
Asssistant County Attorney
501 Court House
Duluth, Minnesota 55802
Telephone: (218) 723-3501
Counsel for Petitioner

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This reply is a response to the points raised in the briefs submitted by the respondent, William Helenbolt, and by Mark Bailey.

1. *Jurisdiction.* The Petition for a Writ of Certiorari does seek review of a final judgment on a constitutional issue rendered by the highest Court of the State pursuant to 28 U.S.C. § 1257. The question in this case was first presented to the trial court pursuant to Minnesota Rules of Criminal Procedure 10.01 and 11.04. The question required the trial court to interpret the Fifth Amendment privilege against self-incrimination. The State of Minne-

sota exercised its right to appeal the order of the trial court pursuant to Minnesota Rule of Criminal Procedure 29.03. The Minnesota Supreme Court affirmed the ruling of the trial court on the ground that the State had failed to demonstrate that the ruling was clearly erroneous and that it would have a critical impact on the outcome of the trial. *State v. Helenbolt,* — Minn. —, 280 N.W.2d 631 (1979). The determination that the ruling of the trial court was not clearly erroneous necessarily involved constitutional interpretation of the Fifth Amendment by the State Supreme Court.

It should also be noted that this is the only time at which the State may seek review of this constitutional question. If the case goes to trial without further review and the defendant is acquitted, then the Double Jeopardy Clause of the Constitution would prevent the State from obtaining appellate review at that point. If the case goes to trial and the defendant is convicted, then the constitutional question will be moot. This is a case where there has been a final decision on the constitutional question with further proceedings in the trial court to follow, but in which later review of the constitutional issue cannot be had whatever the ultimate outcome of the case. See *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975). Thus, the decision of the Minnesota Supreme Court is in fact a final judgment.

The respondent's contention that a decision overruling the claim of privilege would not be binding on Bailey because he is not a party to this case is erroneous. Bailey is a prospective witness in this case. It is the responsibility of the trial court in the first instance to determine if a wit-

ness has a valid claim of the privilege against self-incrimination *State v. Moose,* — Minn. —, 266 N.W.2d 521 (1978). In this case, the Minnesota Supreme Court has affirmed the ruling of the trial court that the witness does have a valid claim of the Fifth Amendment privilege. If this Court reverses that judgment, then the trial court would have to follow the constitutional interpretation of the highest court of the land and would order the witness to testify. The witness would have to obey that order on pain of contempt of court.

2. *Case Or Controversy Requirement.* The respondent's contention that Bailey has not yet asserted a claim of the privilege against self-incrimination is erroneous. At his sentencing Bailey indicated through his attorney that he will assert the Fifth Amendment privilege and will refuse to testify in this case. This assertion of the privilege is a matter of record in State of Minnesota v. Mark Allen Bailey, District Court File No. 13863, Transcript of Sentencing p. 15. It should also be clear from the fact that Bailey has filed a brief in opposition that he is asserting the privilege against self-incrimination.

3. *New Case.* After the filing of the Petition for a Writ of Certiorari in this case, the Minnesota Supreme Court handed down a relevant decision in *State v. Hanson,* — Minn. —, 285 N.W.2d — (Nov. 2, 1979). In that case the trial court allowed the State to introduce answers given by the defendant to the State Attorney General during an independent investigation. In doing so the trial court overruled the defendant's claim of the privilege against self-incrimination. The Minnesota Supreme Court affirmed the decision of the trial court and ruled that a defendant must claim a Fifth Amendment privilege in lieu of answering

questions or the privilege is waived. The Minnesota Court cited *Garner v. United States,* 424 U.S. 648 (1976).

The reasoning of the *Hanson* case applies to this case as well. Bailey made a knowing waiver of his privilege against self-incrimination at the time that he was questioned by Sgt. Hall. He may not now refuse on the basis of the Fifth Amendment to testify about the facts that he has already disclosed.

4. *Conclusion.* For the foregoing reasons, as well as those which have been urged in the Petition, certiorari should be granted.

Respectfully submitted,

ALAN L. MITCHELL
St. Louis County Attorney
/s/ MICHAEL W. McNABB
Assistant County Attorney
501 Court House
Telephone: 723-3501
Duluth, Minnesota 55802